



IN THE 2  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1944

**No. 1284**

Supreme Court, U. S.

FILED

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CHARLES ELMORE DORRLEY  
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EDNA F. STONESIFER AND JOSEPH N. STONESIFER,  
HER HUSBAND, *Petitioners,*  
vs.

CARL J. SWANSON, LOUIS H. HAMMERSTROM,  
INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND  
TESTAMENT OF LILLIAN F. SWANSON, DECEASED, GEORGE  
F. ANDERSON, EDITH B. SLUTZ, DONALD P.  
SLUTZ, RUTH BARRE, DENZIL BARRE, AND  
CHICAGO CITY BANK AND TRUST COMPANY, AN  
ILLINOIS BANKING CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.

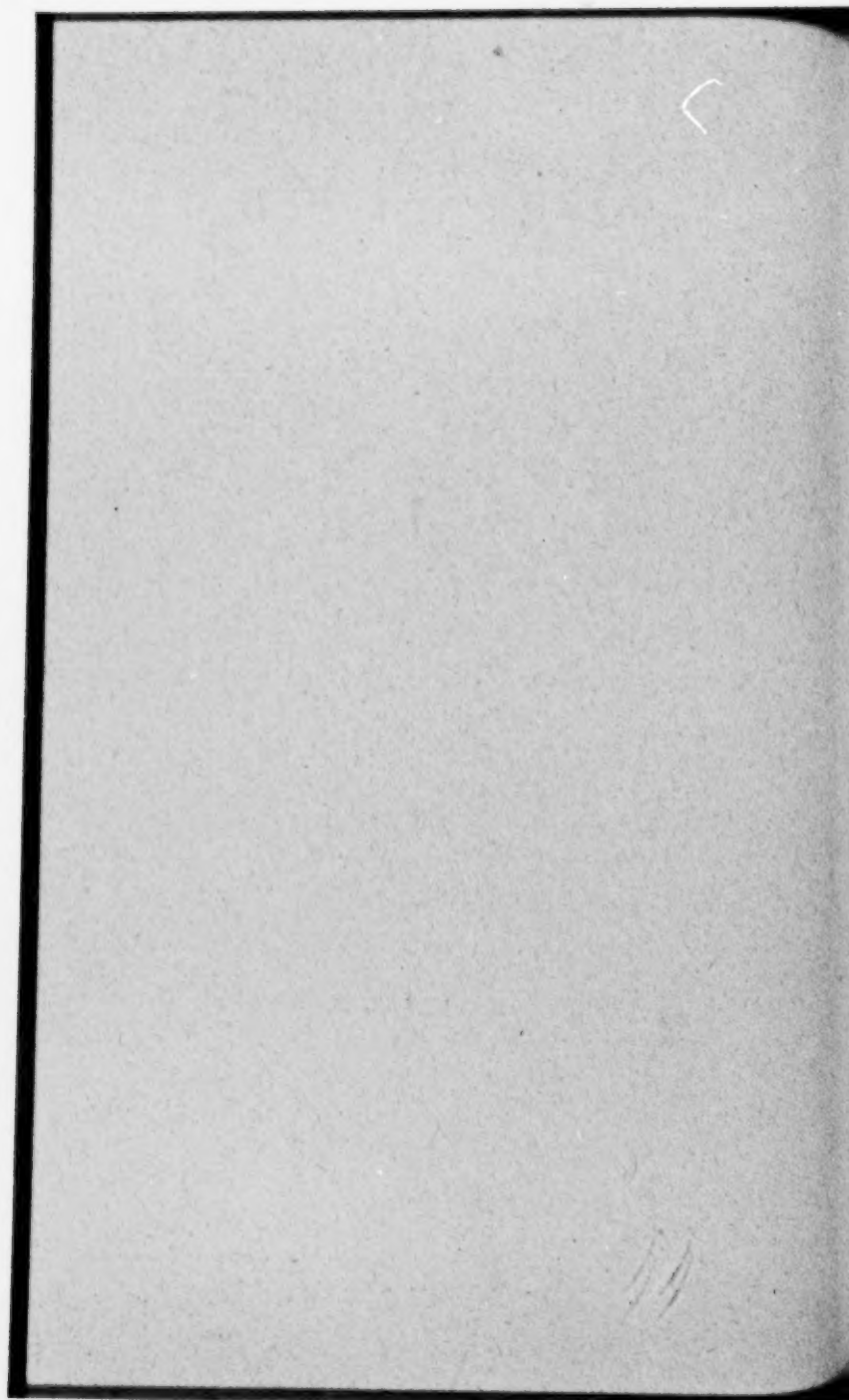
**BRIEF IN OPPOSITION.**

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**REPORT OF OPINION IN THE COURT BELOW.**

The opinion in the Circuit Court of Appeals is set forth in full at pages 1100 to 1104 of the printed record. It will also be found at 146 F. (2d) 671. We shall refer to the opinion as it appears in the printed record.

**STATEMENT OF FACTS.**

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The statement of facts contained in the petition is inaccurate and misleading in many respects and is not supported by any reference to the record. The testimony which was conflicting covers approximately 850 pages of the printed record. (R. 89 to 936.) We do not regard it as necessary to make a separate statement of facts, but would refer the Court to the Master's report, wherein the Master stated the facts in his findings of fact and conclusions and recommendations. (R. 1030-1039.) The settlement agreement appears at pages 941-942 of the record.

## ARGUMENT.

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### A.

**The Circuit Court of Appeals reviewed the evidence and found that the evidence sustained the findings of fact.**

The third sentence of Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a Master to the extent that the court adopts them, shall be considered as the findings of the court."

Petitioners state that the Circuit Court of Appeals held that it could not review the evidence and was bound by the findings of the trial court (see pp. 4 and 7 of petition for certiorari). The Circuit Court of Appeals did not so hold. That Court stated (R. 1102-1103):

*"We accept for the purpose of this argument the plaintiffs' theory that there existed a fiduciary relationship between the stepfather and the daughters; also, between the executor, the executor's attorney, and the legatees, the two daughters.*

*"So approaching the evidence, we are nevertheless persuaded that on the issue of a breach of fiduciary relationships the evidence supports the finding of the master so far as Anderson, the attorney, and Hammerstrom, the executor, are concerned. It would serve no useful purpose to recite all the testimony, or the major portion of it, bearing on this question. Suffice it is to say that the evidence not only supports the finding of the master and the District Court, but*

*in our opinion, makes any contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted.*

“As to Swanson, the stepfather, the dispute is not so readily disposed of. We think a finding in favor of the plaintiffs as to him would have been supported by the evidence. *On the other hand, we can not say there was no support for the findings as made.* Conceding the fiduciary relationship existed between the stepfather and the daughters and also that the burden was upon the stepfather to show good faith on his part in the dealings which finally culminated in the agreement in question, *we are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court.*

“This is not a trial *de novo*. The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made.” (Italics ours.)

Surely, this portion of the opinion shows that the Court of Appeals *did* review the evidence, and having reviewed it, determined that the findings of the Master and the District Court were not “clearly erroneous” and sustained those findings. The Court also discussed the evidence concerning other controverted issues and sustained the findings thereon.

Petitioners seek to sustain their contention by picking sentences from the opinion and isolating those sentences from their context. Surely, the last paragraph above quoted read in connection with the paragraphs immediately preceding it is not susceptible of the construction petitioners seek to place upon it.

\* \* \*

Rule 52(a) merely states the practice existing in Federal Courts in reviewing equity cases prior to its adoption (Note of Advisory Committee on Rules, 28 U. S. C. A., following § 723c, pp. 677-8; *District of Columbia v. Pace*, 320 U. S. 698, 701, 88 L. Ed. 408, 410); a practice so well settled by many decisions of this Court (*Adamson v. Gilliland*, 242 U. S. 350, 353, 61 L. Ed. 356, 357; *Lawson v. United States Mining Company*, 207 U. S. 1, 12, 52 L. Ed. 65, 75; *Davis v. Schwartz*, 155 U. S. 631, 636, 39 L. Ed. 289, 293) as to need no further pronouncement from this Court. We submit, however, there is no conflict between the Sixth, Seventh and Eighth Circuits. The decisions in each of these Circuits hold that the Circuit Court of Appeals may review the evidence, but may not set aside findings of fact, unless such findings are clearly erroneous.<sup>1</sup>

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<sup>1</sup> *Sixth:*

*Anderson v. General Am. Life Ins. Co.*, 141 F. (2d) 898, 901, 904;  
*Green v. Electric Vacuum Cleaner Co.*, 132 F. (2d) 312, 313;  
*Andrew Jergens Co. v. Conner*, 125 F. (2d) 686, 689.

*Seventh:*

*Kerr v. United States*, 131 F. (2d) 450;  
*United States v. 62 Packages of Marmola Tablets*, 142 F. (2d) 107, 109;  
*Wertz v. National City Bank of Evansville*, 115 F. (2d) 65, 68, cert. den. 311 U. S. 675, 85 L. Ed. 434.

*Eighth:*

*Killoren v. First Nat. Bank*, 127 F. (2d) 537, 539, 540;  
*F. W. Fitch v. Camille, Inc.*, 106 F. (2d) 635, 639;  
*Kimm v. Cox*, 130 F. (2d) 721, 741.

**B.****Petitioners' argument concerning the burden of proof has no application to this case.**

Petitioners cite Illinois cases to the effect that, where one who stands in a position of trust and confidence benefits by a transaction, he has the burden of proof to establish the fairness of the transaction and to show that it did not proceed from undue influence.

It will be noted that two conditions must be present before this rule concerning burden of proof applies, namely: (1) a fiduciary relationship must be established, and (2) the fiduciary must have benefited by the transaction.

*As to Hammerstrom and Anderson.*

Throughout the petition Anderson is referred to as Swanson's attorney; actually he was attorney for Hammerstrom, the executor (R. 95, 135, 260, 276, 330, 381, 873, 1031). Conceding, for the purpose of this argument, that Hammerstrom, the executor, and Anderson, his attorney, occupied a fiduciary position, it appears that neither one of them was a party to the settlement agreement (R. 941), which is here sought to be set aside, and neither of them benefited in any way by that agreement. Consequently, the rule contended for by petitioners cannot apply to Hammerstrom or Anderson.

Furthermore, the Master found that the settlement agreement was a good, valid and binding agreement and "was not induced by reason of fraud, collusion or breach of any fiduciary relationship on the part of Anderson, Swanson or Hammerstrom, or either of them," and that said agreement was executed by all of the parties thereto of their own free will and accord (R. 1036). The Master

further found that neither Hammerstrom nor Anderson at any time practiced actual or constructive fraud (R. 1037, 1038). These findings were expressly confirmed by the District Court (R. 1058).

At the conclusion of the hearing before the District Court the presiding Judge stated:

"I wonder why this lawsuit was ever brought." (R. 938.) \* \* \* "it would appear to me that George Anderson, instead of being condemned, ought to be commended for the part he has taken in this matter," (R. 939) \* \* \*.

"It appears it was entered into openly and willingly and with the full knowledge of all the people who signed that agreement, and there were seven of them. I repeat, again, instead of condemning this man Anderson, I think he should be commended for trying to settle a very difficult problem and which, if it had been settled at that time in that fashion, would have saved much money for all litigants involved in this lawsuit." (R. 940.)

The Circuit Court of Appeals accepted "for the purpose of this argument" petitioners' theory that Hammerstrom and Anderson occupied a fiduciary position, but said: "Suffice it (is) to say that the evidence not only supports the findings of the master and the District Court, but in our opinion, makes any contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted."

*As to Swanson.*

Kinship alone is not sufficient to establish a fiduciary relationship (*Dyblie v. Dyblie*, 389 Ill. 326, 59 N. E. (2d) 657 (brothers), *O'Malley v. Deany, et al.*, 384 Ill. 484, 51 N.E. (2d) 583 (mother and son), *Kosturska v. Bartkiewicz*, 241 Ill. 604, 89 N.E. 657 (mother and daughter)).

The Master found that even assuming a confidential or fiduciary relationship existing between Swanson, the stepfather, on the one hand, and his two stepdaughters, on the other, namely, Edith B. Slutz and Edna F. Stonesifer, the evidence submitted "unquestionably demonstrates that such relationship, *if any existed*, was terminated on December 10, 1941, and was not revived prior to January 29, 1942," (R. 1036) the date of the execution of the settlement agreement. The District Court approved the findings of the Master (R. 1058). Consequently, there being no fiduciary or confidential relationship between Swanson and his stepdaughters, the rule contended for by petitioners concerning the burden of proof has no application.

Furthermore, the Circuit Court of Appeals, after reviewing the evidence, said that even conceding a fiduciary relationship existed between Swanson and his stepdaughters, and conceding also that the burden was on Swanson to show the fairness of the transaction, "we are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court" (R. 1103).

There is no contention that Ruth Barre occupied a fiduciary position.

In view of the foregoing we do not deem it necessary to discuss whether burden of proof is a substantive right governed by State law or a matter of procedure governed by Federal rules and decisions. Nor do we deem it necessary to discuss whether the rule concerning the burden of proof in the Federal Courts is different from the rule in the State Court.

## C.

**The excluded evidence was considered by the Circuit Court of Appeals.**

The following appears in the opinion of the Circuit Court of Appeals:

" \* \* \* There was a letter found in her lock box which gave her reasons for this disinheritance." (R. 1101.)

\* \* \*

" \* \* \* There is a conflict in the evidence as to the condition of her mother at the time she gave the direction to Edith to go to the bank and take this money and divide it with her sister, Edna." (R. 1101.)

It is evident that the Court of Appeals, for the purpose of reviewing the evidence, treated the two excluded items of evidence concerning which petitioners complain, as though they were in evidence, but nevertheless determined that the findings of the trial court should not be disturbed. Consequently, it appears that, even if the Master had been in error in excluding the evidence, such error would not be ground for reversal, as the decision would have been the same even though the evidence had been admitted (Rule 61, 28 U. S. C. A., following §723c, p. 730). In view of this, it was needless for the Court of Appeals to decide whether the evidence had been properly excluded.

We submit, however, that the two items of evidence were properly excluded:

1. *The letter from Mrs. Swanson to her daughters.* Petitioners state that this letter "is of the highest probative value in establishing the fraud of the fiduciaries" (p. 23), and then infer that the letter is of importance

in connection with the question of a prenuptial or postnuptial agreement (p. 24). Petitioners failed to explain wherein the letter has any connection with fiduciary relationships or with prenuptial or postnuptial agreements, and we can see no connection. The letter was never delivered; it was found in the mother's safety deposit box after her death (R. 111). The letter has no probative value. It is invalid as a testamentary disposition and, even if it were valid for that purpose, it was revoked by the will executed four and one-half months later (Pltffs' Ex. 8, R. 959).

2. *Testimony as to purported conversation between decedent and her daughter, Edith Slutz, concerning the \$17,000.00, shortly prior to decedent's death.* As to Edith's offered proof of conversation with her mother shortly before her death, the evidence was properly excluded since it was not competent under Section 2 of the Illinois Evidence Act. (Ill. Rev. Stat., 1943, Chap. 51, Sec. 2; *Rothwell v. Taylor*, 303 Ill. 226, 230, 135 N.E. 419; *Campbell v. Campbell*, 368 Ill. 202, 204, 13 N.E. (2d) 265; *Waugh v. Moan*, 200 Ill. 298, 302, 65 N.E. 713.) It is a fact, however, that petitioners had the advantage of Edith's account of this alleged conversation with her mother, since she was permitted to recount it when testifying to a conversation which took place at one of the conferences in Anderson's office (R. 356).

### CONCLUSION.

Petitioners state that "the recited consideration for the settlement was that Ruth agrees not to contest the validity of said will." The agreement itself which sets forth the numerous considerations (R. 941), and the finding of the Master (R. 1037) adopted by the trial court that the settle-

ment agreement avoided a multiplicity of suits, belies that statement.

We respectfully submit that the petition for certiorari should be denied. This case has been thoroughly considered by the Master, by the District Court and by the Circuit Court of Appeals. No new or important questions of law are involved. We sincerely believe that the petition fails to present any reason for a review of this case by this Court.

Respectfully submitted,

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